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No. 71-104

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1971

IN THE MATTER OF:

Petition for F. J. REILLY for review of an Order of the NATIONAL RAILROAD ADJUSTMENT BOARD, FIRST DIVISION

BRIEF OF PENN CENTRAL TRANSPORTATION COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

Penn Central Transportation Company is successor in interest to Cleveland, Cincinnati, Chicago and St. Louis Railway Company, petitioner's former employer.

The award of the First Division of the National Railroad Adjustment Board was reached on the merits since the *ex parte* submission, as the Circuit Court of Appeals noted (Appendix A, 2a, 4a), did contain the evidence and argument on petitioner's version of his claim as was usual in such submissions.

Further hearing was "waived" (Award, National Railroad Adjustment Board, Appendix C, 8a).

ARGUMENT

I. THE 1955 AWARD HAD THE EFFECT OF A FINAL JUDGMENT AND THE 1966 AMENDMENT MAY NOT BE GIVEN RETROACTIVE APPLICATION.

It was stated in *Hoyt Metal Co.* v. *Atwood,* 289 F. 453 (7th Cir. 1923), at page 455, by reference with approval to 6 R.C.L. that:

> "A judgment is such a vested right of property that the Legislature cannot be a retroactive law either destroy or diminish its value in any respect."

That case involved a judgment for plaintiff's damages through lead poisoning in the amount of $7,000.00. After judgment, the Occupational Disease Law was amended to provide that such an employee should receive compensation under the Workmen's Compensation Act. This would have reduced the award to $3,500.00 and would have compelled a new proceeding. At page 455, the Court said:

> "The statute in question, though purporting to affect only the remedy, in reality impairs the value of a right. Though it may be true that parties to actions have no vested right in rules of procedure, and the latter may be changed at will by the Legislature, without affecting the right, yet if statutes, professing only to affect procedure or remedy, do in fact thereby affect or impair the right, they are void or inapplicable as against the enforcement of the right thus impaired."

"Minor" disputes under the Railway Labor Act are controversies ". . . over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee". *Brother-*

hood of Railway Trainmen v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 at pages 625 of the L, Ed. citation. At page 628 of the L. Ed. citation, the Court said:

> "This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history."

This case was referred to by the Supreme Court in *Gunther* v. *San Diego and Arizona Eastern Railway Co.*, 382 U.S. 257, 86 S. Ct. 368, 15 L. Ed. 2d 308 (1965). At page 312 of the L. Ed. citation, the Supreme Court said:

> "This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board."

Since the award had the same finality as a decision of arbitrators would have, it, of course, had the force and effect of a judgment. Such rights may not be diminished, enlarged or adversely affected by subsequent legislation. *People ex rel. Allied Bridge and Construction Co.* v. *McKibbin*, 380 Ill. 63, 66 (1942).

In *Arnold & Murdock Co.* v. *Industrial Commission*, 314 Ill. 251 (1924), an Industrial Commission award for total disability and a pension for life had been affirmed by Circuit and Supreme Courts. It was sought to diminish the award by petition alleging that the disability had decreased or ended and that an amendment enacted subsequent to the award required this reduction. In denying this contention, the Court, pages 254-255, said:

> "No one has a vested right in a public law, but the legislature may repeal or amend all legislative acts not in the nature of contracts or private grants. Such repeal or amendment, however, cannot have the effect of extinguishing rights which have been acquired under the law."

In this situation, the case of *Orlicki* v. *McCarthy*, 4 Ill. 2d 342, relied upon by petitioner, was distinguished in *Hogan* v. *Bleeker*, 29 Ill. App. 2d 181 (1963), where the Court, page 187, said this:

> "However, even procedural or remedial statutes are not construed retroactively where to do so would deprive one of a vested property right. "'Remedies are the life of rights, and are equally protected by the constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away.'" (*Board of Education* v. *Blodgett*, 155 Ill. 441)."

See also *U.S.* v. *Ruppel*, 6 F. Supp. 346 (S.D. Ill. 1934) where it was stated, page 347:

> "The general rule with reference to a final judgment in both civil and criminal cases seems to be that no act of a legislative body can affect a valid subsisting judgment."

Petitioner cites two cases (Petition, 4, 8), in which it is said that the 1966 amendment was given retroactive effect. The decisive factor, however, in each of these cases was that the proceedings to enforce or review the awards of the Railroad Adjustment Board were *pending* at the time of the amendment. In *Hanson* v. *Chesapeake and Ohio Railroad Company*, 291 Fed. Supp. 401 (S.D. West Virgina 1968) at page 405 in footnote 1, the Court said:

> "As to the question of the applicability of an amended statute with respect to cases *pending but not disposed of* at the time of the amendment, the Supreme Court has consistently held that an intervening statutory change, particularly one affecting jurisdiction, is applicable." (Emphasis supplied).

The present case was not "pending" in 1966 at the time of the amendment; it had been finally determined some eleven years prior.

Likewise, in *Brotherhood of Railroad Trainmen* v. *Denver and R. G. W. R. Co.*, 370 Fed. 2d 833 (Tenth Cir. 1966), at page 835, the Court said:

> "As we have earlier indicated, this action was *pending* before us on June 20, 1966, the effective date of Public Law 89-456. It is very clear that the judgment of the district court, regardless of its correctness when entered, must now be given *appellate* consideration in view of the amendments to the controlling statutes." (Emphasis supplied).

At page 7 of the present Petition for Certiorari, it is stated that retroactive application should be given to the 1966 amendment since the amendment was "procedural, only". It seems obvious, however, that attaching the right of appeal by an amendment in 1966 to an award which had become final under the prior law in 1955 goes beyond mere procedure.

In *United States* v. *Magnolia Petroleum Company*, 276 U.S. 160, 48 S. Ct. 236, 72 L. Ed. 509, there was involved the right of a taxpayer to have interest on a tax refund computed under a 1921 Statute more favorable to the taxpayer or under a 1924 Act more favorable to the government. At pages 511-512 of the L. Ed. citation, the Court said:

> "There is nothing to suggest that Sec. 1019 was intended to change the rule as to refunds *theretofore* allowed. The language employed shows the contrary. The words are 'upon the allowance of . . . a refund . . . interest shall be allowed . . . from the date of such tax . . . was paid.' Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions (163) unless the legislative purpose so to do plainly appears." (Emphasis supplied.)

This principle applies here. The "status" of petitioner's claim was "fixed" in accordance with the Railway Labor Act prior to the 1966 amendment in that his claim had been determined with finality.

II. THE PETITION FOR REVIEW OF THE AWARD OF THE NATIONAL RAILROAD ADJUSTMENT BOARD DID NOT STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

In the transcript of the proceedings before the First Division of the Adjustment Board, the relevant articles of the collective bargaining agreement and the operating rules under which the parties were operating were set forth.

Accordingly, as was said in *Edwards* v. *St. Louis-San Francisco Railroad Company,* 361 Fed. 2d 946 (7th Cir. 1966):

> "Appellant, therefore, cannot come before this or the district court complaining that the award of the Railroad Adjustment Board was based on insufficient evidence or that the Board incorrectly or wrongfully applied a provision of a collective bargaining agreement."

It was claimed in the courts below that the Board's award and the proceedings giving rise thereto effectively denied due process to petitioner. Answer to petitioner's contention that the matter was not heard on the merits—despite the fact that the submission contained items of evidence as well as arguments on the merits—and that the proceedings prior to submission to the Board were arbitrary, is found in *Edwards* v. *St. Louis-San Francisco Railroad Company,* 361 Fed. 2d 946 (1966), at page 954:

> "Therefore, when a railroad employee questions the propriety of the initial hearing held on carrier property, his claim must be based on the provisions of the collective bargaining agreement relating to that subject. In this case, appellant's due process claim put in Article 40 of the bargaining agreement and, more precisely, the words 'all witnesses' contained therein. The award of the Adjustment Board holding that Article 40 referred only to those witnesses under the control and direction of the carrier, as we have said, is not subject to review in federal court nor may this Court substitute its views as to the proper interpretation thereof."

If from 1955, the date of the award, petitioner had a right to review for deprivation of due process, then his petition is barred by the two-year provision of 45 U.S.C.A., Section 153 (q), as this statute was amended in 1934. If he did not have a right to review, then he is barred by the provision of Section 153 (m), which provides that the award shall be "final and binding upon both parties to this dispute . . . .".

Since it was claimed in the courts below that he was denied due process, he did have, during all those years, a right to review, which has been lost by the express two-year review provision as well as by laches. *Ellerd* v.

Southern Pacific Railroad Company, 241 Fed. 2d 541 (7th Cir. 1957), and the above case of *Edwards* v. *St. Louis-San Francisco Railroad Company*, 361 Fed. 2d 946 (7th Cir. 1966).

The 1966 amendment cannot, much less did it purport to, revive a right of review which had been lost by October 8, 1957.

It requires no citation of authority for the proposition that a constitutional right—a belated claim of lack of due process—can be lost by failure to plead it, failure to seek review, or any other act of waiver by way of laches. 16 *C.J.S.*, Constitutional Law, Section 89, page 263. See also *Gordon* v. *Eastern Airlines, Inc.*, 268 Fed. Supp. 210 (W.D., Va. 1967).

CONCLUSION

Respondent respectfully submits that the 1966 amendments to the Railway Labor Act could not, and did not, have the effect of permitting the revival of a 1955 award which was final and binding, for the purpose of a retroactive review. It is further submitted that petitioner is barred by the two-year statute of limitations, by laches, and that even under the 1966 amendment, no showing is made under the restricted right of review there given to future cases.

Accordingly, respondent respectfully asks that the Petition for Certiorari be denied.

Respectfully submitted,

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